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Did the Government Use Testimony It Knew to Be Tainted?

The Jencks Decision Reopens the Matusow Case

The Supreme Court decision in the Jencks case only tells half the story. It deals with the trial and conviction of Clinton E. Jencks, an official of the Mine, Mill & Smelter Workers Union in New Mexico, for falsely swearing out a Taft-Hartley non-Communist affidavit. The decision does not deal with the sensation which followed the trial, when the government's chief witness Harvey Matusow recanted, nor does it pass on the denial of Jencks' motion for a new trial on the basis of that recantation. Without this other half of the story, the full significance of the Jencks decision has been missed. And the press has taken more seriously than the facts warrant Mr. Justice Clark's almost hysterical protest that the Court has opened FBI files "to the criminal and thus affirmed a Roman holiday for rummaging through confidential information as well as vital national secrets."

Not A Fishing Expedition

A reader of the Supreme Court decision sees the facts only as they appeared at the trial before Matusow's recantation, though the Court itself got the full story in the pleadings. A casual reader of the decision gets the impression that the Jencks defense at the trial was engaged in no more than a kind of fishing expedition in the FBI files when it asked the trial judge to subpoena the original reports made to the FBI about Jencks by Matusow and J. W. Ford, another Communist turned FBI informer for pay. The defense asked that it be allowed to use the reports to test the credibility of these two witnesses if the reports varied from their testimony at the trial. The Judge refused, and because of this refusal the Supreme Court ordered a new trial at which the original reports must be made available to the defense.

The decision does not go on to explain that the hunch which led the defense to ask for the reports was dramatically given new support within a few months by Matusow's recantation. At the hearing on the motion for a new trial, Matusow turned defense witness and told the trial Judge (R. E. Thomason, in El Paso, Texas) that his original reports to the FBI would show that he never at any time identified Jencks as a member of the Communist party. In addition, under cross-examination by the government, Matusow said that after testifying to the grand jury which indicted Jencks, he told an FBI man in Santa Fe he did not want to testify at the forthcoming trial because "I didn't feel my testimony was honest." Matusow said the FBI man took this down in writing and showed it to him for verification. If this is true, the government went to trial knowing that its case depended on dubious or tainted testimony.

After hearing Matusow's testimony on the motion for a new trial, it was the Judge's duty to subpoena the FBI reports and the Santa Fe document and see for himself whether Matusow was telling the truth. If Matusow was lying, submission of the original reports in evidence was the easiest way to prove his recantation false. If he was telling the truth, the next question for an unbiased and conscientous court was to determine how and by whom Matusow was persuaded to go into court and give testimony he knew to be false. Instead the Court held Matusow in contempt, branded him a perjurer and sentenced him to three years in jail for obstructing justice. The Court of Appeals reversed, holding that Matusow could not be punished by summary contempt proceedings but had a right to a trial on the charge of perjury. The government, instead of trying Matusow for perjury, thereupon dropped the case.

The Law As Stated by The Court

"While we must accept it as lawful for a department of the government to suppress documents, even when they will help determine controversies between third persons, we cannot agree that this should include their suppression in a criminal prosecution, founded upon those very dealings to which the documents relate, and whose criminality they will, or may, tend to exculpate. So far as they directly touch the criminal dealings, the prosecution necessarily ends any confidential character the documents may possess; it must be conducted in the open and will lay bare their subject matter. The government must choose; either it must leave the transactions in the obscurity from which a trial will draw them, or it must expose them fully."

—Judge Learned Hand, in U.S. v. Andolschek, as quoted by Mr. Justice Brennan in U.S. v. Jencks.

His Word Against Roy Cohn's

The Justice Department had better luck in New York. There Matusow had recanted crucial testimony in the Smith Act prosecution of the "second echelon" Communist leaders and claimed that he had been coached by Roy Cohn. The government charged this was perjurious, and cited Matusow's recantation in the Jencks trial as evidence of his instability. With Matusow's word pitted against Roy Cohn's, Matusow was found guilty by Federal Judge McGohey and sentenced to five years in jail for perjury. An appeal from this conviction is being filed with the Supreme Court this week.

Matusow as well as Jencks was hurt by the Judge's failure to subpoena the FBI reports in the Jencks trial. It is most unlikely that the government will now re-try Jencks, since Matusow was the only witness who claimed to have direct evidence that Jencks was a Communist after taking the Taft-Hartley oath. But what about Matusow? Will the dropping

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Adding up The Score on That Krushchev TV Interview

The Krushchev interview was a major event for all who desire a relaxation of international tension. CBS performed a public service by it. Krushchev's performance was strikingly superior to Chou En-lai's when interviewed some months ago by Ed Murrow. Though the Chinese Communists have shown themselves more flexible theorists than the Russians, Murrow got nothing from Chou En-lai but slogans and propagandistic rantings. Krushchev deserves credit for seizing what Chou En-lai missed, the opportunity to emerge as a human being for an American audience. This humanization of the leaders and people on the opposite side is the first essential toward peace. Will the Russians reciprocate by ending the shamefully mendacious current "smear America" campaign in the Soviet press?

Too Many Threats

There was nothing new in the Krushchev interview but then there rarely is in any interview with a top rank leader. But he said some things which need to be said, and which he as a Russian had a right to say to an American audience. He had a right to complain of the generals and admirals in our own country who make entirely too many speeches "saying in how many hours the Soviet Union can be destroyed by the power of the United States." He was making a good point when he said that the trade embargo we impose on the Soviet bloc "does little damage to us. On the contrary, it compels us to make an extra effort and produce things at home which would otherwise have been brought from your country."

Next in importance was the picture of Krushchev himself which emerged from the hour long interview. It was the picture of a shrewd manager in a socialist society, himself passionately concerned about his own major assignment—an increase in food output. He was agile in evasion where he did not want to meet the issue, and he is obviously a man of ability. He can also be as tricky—and transparent—as a peasant haggling over a pig. When, for example, Krushchev said the Soviet armed forces had already been reduced by 1,800,000 men, B. J. Cutler of the New York *Herald-Tribune* asked him how many men remained. His answer was that he didn't know the question would arise and therefore had not asked the Minister of Defense and didn't know. This was not very clever.

No Competition in Ideas

With this peasant slyness goes a conventional Communist mind. He foresees competition in production but not in ideas; his remarks on jamming the Voice of America show how naturally he takes to the sophistries of Soviet censorship.

When Daniel Schorr of CBS asked him about that recent statement by Peking which *Pravda* republished on the contradictions which arise under Communism between the masses and the leaders, Krushchev denied that there were any such contradictions in Russia. This will evoke a discreetly silent but unmistakable horse laugh among those who read it in Russia.* Finally, after all that happened in Poland and Hungary, Krushchev can say, "We have no intention of imposing our ideas on anybody" and predict that the Kadar regime in Hungary "will flourish for ages to come."

But we see nothing ludicrous in Krushchev's challenge to test his assertions by mutual withdrawal of troops from Europe. If we believe that most of the East European satellite regimes rest ultimately on Red Army bayonets, would not mutual withdrawal liberate these regimes?

The real reason for resisting this proposal is that U. S. diplomacy is not concerned with East European liberation but with building up German military power in alliance with the West to the point where the Russians and Poles might be forced to accept a territorial revision which will again open Slavic East Europe to German expansion. The atomic pistols are being cocked in the hope of some day frightening the Russians into just such a surrender. This is the key to the barren vagueness of disarmament talks.

* No doubt this is why the Soviet censor struck this question and answer out of the version released in Russia.

A Rumanian Exile's View

"Western diplomacy has wrongly put the emphasis on German reunification, ignoring the Central European countries. This tendency has increased in the last few months because of the forthcoming West German elections. German unity cannot be achieved by neglecting those other states. It can more easily be achieved by dealing with the whole problem of the satellite States. . . .

"Our conviction is that both the West and Soviet Russia would benefit if the neutral belt could be realized. An existing example is Finland, a free, anti-Communist but militarily neutral country, whose neutrality has given Scandinavia and Russia a feeling of security and whose economy has been flourishing because of its growing trade with Russia."

—"To Free The Satellites," by V. V. Tilyea, Rumanian Minister to Britain, 1938-40, in the London Times, May 26.

To Be Read With the President's Press Conference Claim of A "Cleaner" Bomb

"I have just read the press release issued by the Atomic Energy Commission 'for A. M. Release Wednesday, May 29, 1957' announcing progress in their so-called 'clean weapons' program. . . . The release bears a curious parallel to the original 'clean bomb' press release last July 19. . . .

"Testimony before the Joint Committee [on Atomic Energy] during the current fallout hearings and in prior executive sessions has indicated that the AEC statement that 'the success thus far achieved (in developing cleaner weapons) has convinced us that widespread hazard from fallout is not a necessary complement to the employment of large nuclear weapons' is misleading. . . .

"It is true that fallout is being reduced. But there is and at present cannot be such a thing as an absolutely clean bomb, i.e. no fallout. Moreover, in any large scale war, it would seem inevitable that weapons of varying degrees of cleanliness will be used, and the inevitable result will be large-scale fallout.

"It tends to give the impression that weapons tests from so-called clean bombs have little fallout. This is a subject which these hearings will explore further. So far we have been provided with no evidence to prove the Commission's assertion. We have no assurance that Russian or British tests are or will be free of substantial radioactive fallout.

"Senator Anderson [Chairman of the Joint Committee] has asked me to add that he fully endorses this statement."

—A release the press ignored by Rep. Chet Holifield, Chairman of the Subcommittee on Radiation, May 29

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Glimpses of A Capital With Revolt Breaking Out Everywhere

The most charming event of the week—it had the flavor of small town America before jet planes and Madison avenue came along—was the pilgrimage of the President to Capitol Hill, where he bought Republican members of Congress one of those dyspepsia creating fried chicken box lunches in an effort to soften them up on the budget. This was a Canossa, but Dubuque, Iowa, style, without snow or hard feelings. The President picked up a $284.11 tab for the lunch, but nobody mentioned the budget. "We were just talking about pleasant things," Joe Martin explained. We cherish the scene, and in it lovingly salute the Republic.

The President had better start giving fried chicken lunches all over town. The whole place is in revolt. The House for the first time since the Korean war revolted against the Pentagon and snipped two and a half billion dollars off the military budget. The Joint Congressional Committee on Atomic Energy under Clint Anderson and Chet Holifield was in the second week of public hearings that had utterly destroyed the complacency nurtured by Admiral Strauss of the Atomic Energy Committee about nuclear tests, their negligible effects and growing "cleanliness." Another powerful cold war force, the China Lobby, seemed to have collapsed; even Senator Knowland was curiously muted in his reaction to Britain's lifting of the bars on the Red China trade; the President himself indicated that he was for easing the barriers, and what looks like a bloc is forming in Congress to favor wider trade with China, prominent in it those powerful Southern Senators who want to divert cheap Japanese cotton textiles away from the U. S. These are striking changes in the Washington landscape. Gen. Taylor, the Army Chief of Staff, chose this moment to tell the graduating class at West Point how much the Army was needed for "brush fire" wars but one reason the House revolted on the military budget was its discovery that $110 million given the Army to buy planes which could carry mobile divisions—tanks and all—to "brush fires" anywhere in the world had been converted to the purchase of two dozen super-plushy DC-6's to carry military VIP's in Waldorf Astoria comfort on their trips across the Atlantic.

An Old Fashioned Trust-Busting "Coup d'Etat"

In some ways the strangest revolt of the week occurred on the Supreme Court. I am not referring to the Jencks case, which merely reaffirmed traditional law. I am referring to the du Pont decision. This was not only a revolt, but a coup d'etat, in the sense that a minority took advantage of odd circumstances to write the law. The case was decided 4-to-2. Clark, Harlan and Whittaker took no part; the first because he had been Attorney General when the suit was begun, the second because he had once been counsel for du Pont and the third because he was not on the court when the case was argued. The two Eisenhower "youngsters," Warren and Brennan joined the two New Deal radicals, Black and Douglas, in a foray which shows that the former share the economic as well as the libertarian predispositions of the latter. Last year, in the anti-trust suit against du Pont for its control of cellophane, du Pont won, with Black, Douglas and Warren dissenting. This time, in a factually much weaker case, they made the law. Strangely enough they made the law on a point the anti-trust division thought so weak they devoted only a few pages of their brief to it and at one time considered dropping. The main attack was on the du Pont-General Motors combine as restraint of trade. The "afterthought" argument on which the decision was based claimed that the original acquisition by du Pont of 23 percent of General Motors stock in 1918 also violated Section 7 of the Clayton Act. The shift by the court from the Sherman Act to the Clayton Act may be explained by the fact that the former illegalizes combinations which restrain trade while the latter illegalizes stock acquisitions by one corporation in another "where the effect of such acquisition *may* . . . tend to create a monopoly." (Italics added). Judging by Mr. Justice Burton's very vigorous and impressively factual economic analysis in dissent, the government failed to prove that the combination actually had restrained trade. There is no doubt, however, that it *might*—and the four Justices of the majority went all the way back to Woodrow Wilson's original purpose in fathering the Clayton Act when they ruled for the first time that Section 7 applied (1) retroactively, (2) to vertical combinations and (3) in the absence of evidence that trade was actually monopolized. The anti-trust division is jubilant; corporation lawyers are in a tizzy; this is trust-busting as it was meant to be a half century ago. Unfortunately this weapon against big business combinations has been put in the hands of an Administration run by big business. Except, it seems, in the choice of Supreme Court Justices.

The most reasonable explanation for the Court's order that the Smith Act "membership" case (Scales and Lightfoot) be reargued is that the seven sitting Justices who heard the argument last Fall couldn't find a point of agreement substantial enough to write a majority opinion. Brennan and Whittaker will sit on the reargument, but since they are almost certain to take opposite sides, this will not solve the problem.

Arthur Miller's Conviction Twinges the Conscience of Conservative Press

Arthur Miller's conviction for contempt of the House Un-American Committee stirred misgivings in newspapers ordinarily sympathetic to investigation of radical activities. The Washington Evening Star (June 3) in an editorial, "A Man and His Conscience," thinks it would be "a harsh consequence" to send a man like Miller to jail.

The Baltimore Sun (June 2), sees Miller as "a minor figure in a considerable company, stretching back through Thoreau and many a Christian saint to Socrates, whose belief in the rightness of their convictions led them to practice 'civil disobedience'."

The appeal will hinge on the issue of "pertinency." The defense claimed there was nothing to show that the writers Miller refused to name had anything to do with passport frauds. Judge McLaughlin ruled pertinency could not "be determined by such a narrow light."

The Committee already had the names of those present at the meeting with Miller. The only purpose was to break his spirit by forcing him to inform. What he resisted, to his honor, was our own variant of "brain-washing."

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Brownell and Hoover Themselves Breached FBI Privacy to Attack Truman

Must Matusow Go to Jail Without His Day in Court?

(*Continued from Page One*)

of the Jencks case end his last chance of proving that his recantation was true? What of the public's right to know the full truth about the Jencks prosecution?

Even Clark Disturbed

The Court split three ways in the Jencks decision, but no one defended the conduct of the trial judge. Even Mr. Justice Clark, the one dissenter, admitted grudgingly, "Perhaps here with a recanting witness the trial judge should have examined the specific documents called for, as the defense requested, and if he thought justice required their delivery to the defense, order such delivery to be made." Justices Burton and Harlan, concurring in the order for a new trial, thought the FBI documents should have been subpoenaed by the Judge but not handed over to the defense unless he considered them relevant to the issues. The majority, speaking through Mr. Justice Brennan, ruled however that it was not enough to let the Judge see the FBI reports; they must be made available to the defense. The conduct of the Judge in the Jencks case supports the reasoning of the majority.

Not A License to Rummage

The majority did not rule, as might have been gathered from some newspaper headlines, that the defense could rummage at will through FBI files. But it did hold that where a witness has been produced by the government the defense has a right to "relevant statements or reports" by that witness "touching the subject matter of the testimony at the trial." The Court held that if the government felt that important secrets were at stake, it could decide not to prosecute rather than reveal such information but could not (in the words of an earlier decision) "undertake prosecution and then invoke its governmental privileges to deprive the accused of anything which might be material to his defense."

With the increasing power of a secret political police in our society, the notion has been fostered that its files must somehow be sacrosanct. There is indeed a good reason for keeping those files private; they necessarily contain much that is unproven and untrue (though the most striking breach of the files was by Attorney General Brownell and J. Edgar Hoover themselves in their 1953 attack on the late Harry D. White and former President Truman).

But where a prosecution is begun, the defense should have a right to know whatever in the government's possession might help clear the accused. This only seems novel in the current atmosphere, which has made a sacred cow of the FBI; actually it goes back to an old and fundamental rule of law, that each side in any case has a right to relevant information in the possession of the other. That the new liberal majority on the Warren Court has so splendidly reaffirmed this is another mark of national recovery from cold war hysteria.

It would be a great pity if the government in the wake of this decision, however, were to be allowed quietly to drop the Jencks case without the public ever coming to see the dirt swept under the rug, the ugly practices covered over, and the continued injustice done to Matusow. In a period when so many of the government's informers have been allowed to commit perjury unscathed, is there no way to get his just day in court for one informer who tried to go straight?

Double-Jointed G-Man— For the FBI and the CP

"J. W. Ford was a member of the Communist Party of New Mexico from 1946 to September 1950 and, from 1948, was a member of the State Board and a party security officer. He said that in 1948 he became a paid undercover agent for the FBI* and reported regularly upon Party activities and meetings. . . .

"Ford's duties as a Party security officer were to keep watch on all Party members and to report 'any particular defections from the Communist philosophy or any peculiar actions, statements or associations, which would endanger the security of the Communist party of the State'."

—Mr. Justice Brennan, in Jencks v. U.S.

"*From 1948 through 1953, Ford was paid $7,025 for his services."

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